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IN THE
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-8

J. B. O'CONNOR, M.D.,
Petitioner

v.

KENNETH DONALDSON,
Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**MOTION OF RESPONDENT FOR LEAVE TO
FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT
AND SUPPLEMENTAL BRIEF OF RESPONDENT**

At the request of the Clerk, both parties agreed to advance oral argument in this case more than one month to January 15, 1975. Since oral argument was heard less than 10 days after the timely filing of respondent's brief, petitioner sought, and obtained, the leave of this Court to file a Reply Brief after argument. The 26 page Reply Brief was filed three weeks later, on February 5, 1975. The advancement of argument at the Clerk's re-

quest and the filing of petitioner's Reply Brief after oral argument prevented respondent's counsel from answering the Reply Brief during his argument before this Court.

Accordingly, respondent respectfully moves for leave to file the attached supplemental brief after argument, pursuant to Rule 41(6), Rules of the Supreme Court, in order to answer concisely the Reply Brief of petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

ARGUMENT

Petitioner's Reply Brief primarily repeats arguments made in his main brief. Respondent wishes, however, briefly to comment on new matters raised by petitioner.

(1) The Right to Treatment

Petitioner concedes that involuntarily confined mental patients "are entitled to adequate treatment", as a matter of constitutional right, Petr. Reply Brief, at 3, 6-7, and endorses respondent's position that courts should inquire whether a patient is receiving "treatment appropriate to his disorder," *id.*, at 7,¹ when reviewing claimed deprivations of the constitutional right. These concessions effectively dispose of the right to treatment issue in the case for they are, in summary form, the legal conclusions respondent urges.

But petitioner then distorts the holding of the Court of Appeals on the constitutional right to treatment in an

¹ Petitioner appears to accept respondent's contention that when determining whether treatment is "appropriate" (petitioner's word) or "reasonable" (the word used by the Court of Appeals and respondent) a reviewing court should inquire whether the treatment provided lies "within a professionally accepted range of treatment modes." Petitioner appears to accept this general standard of review if a right to treatment action is brought on either constitutional or statutory grounds. Petitioner's Reply Brief, at 5, 7.

attempt to make the ruling appear far broader than it is. Without citing any specific language from the Court of Appeals opinion, petitioner states that the opinion "envisioned", *id.*, at 7, "implies", *id.*, at 5, or has "the effect of", *id.*, at 3, holding that state doctors must "answer for their day-to-day diagnostic and course-of-treatment decisions", *id.*, at 3, that treatment decisions will be removed from doctors and lodged with judges, *id.*, at 6 and that the constitutional right to treatment or release requires "the best possible treatment rather than permissible treatment", *id.*, at 7. The only support given for this reading of the opinion below is petitioner's assertion that the Court of Appeals found that "milieu [sic] therapy" is "but an evasive response used by doctors to avoid accusations of inadequate treatment." *Id.*, at 5-6.

As a general matter, these contentions are fully answered in Respondent's Brief, at 56-73. The Court of Appeals did not have to define the right to treatment in detail because it found that the jury could have concluded "that Donaldson's rights had been violated on the basis of the evidence that the defendants obstructed his release even though they knew he was receiving no treatment." 493 F.2d 507, 526. Moreover, respondent submits that if this Court chooses to further define the right, which it need not do, then guidelines derived from existing precedent can be followed—guidelines which take into account petitioner's oft-repeated point that there is diversity of responsible psychiatric opinion and which would leave substantial discretion in the hands of state doctors. Respondent's Brief at 65-66. But it should be emphasized here that the Court of Appeals did not state that "milieu therapy" in general was an improper form of treatment. It only stated that, in the circumstances of this case, "milieu therapy" was "nothing more than keeping Donaldson in a sheltered hospital 'milieu'".

with other mental patients; the defendants did not refer to anything specific about the 'milieu' that was in any special way therapeutic." 493 F.2d at 511. And another defendant below admitted that "milieu therapy", in respondent's case, meant no more than "custodial care." Respondent's Brief, at 6.

(2) Damages

Petitioner asserts that respondent "conveniently overlooks evidence that grounds privileges were rejected because Donaldson had on one occasion attempted to escape from the hospital." Petr. Reply Brief, at 15. That assertion was not made below and is not supported by the record. As the Court of Appeals found, 493 F.2d at 513-514, n.6:

"Donaldson testified that he had once escaped [for 48 hours, in 1957] from the hospital. . . . The hospital record, however, did not show that a fear Donaldson would attempt to escape again motivated the denial of grounds privileges; nor have Gumanis and O'Connor asserted before this Court that such a fear was their reason for denying Donaldson a [grounds privileges] card."

CONCLUSION

Essentially, petitioner's argument is that "the evidence did not support the verdict." Petr. Reply Brief, at 25. See also, *id.*, at 1, 2, 13, 14, 15, 23, 24. There was ample evidence, however, to support a jury finding that petitioner confined respondent for nearly 15 years even though he *knew* that respondent was not dangerous to himself or others and was receiving *no* treatment, and knew that continued confinement, under those circumstances, was not "proper" or "lawfully required," Re-

spondent's Brief, at 5-18, and 74. Accordingly, the verdict and the decision below should be affirmed.

Respectfully submitted,

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